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The Honorable William Kennard
The Honorable Susan Ness
The Honorable Harold Furchgott-Roth
The Honorable Michael Powell
The Honorable Gloria Tristani
Federal Communications Commission
The Portals
445 12th Street
Washington, D.C. 20554

Re: Missouri Municipal League's Petition for Preemption, CC Docket No. 98-122

Dear Chairman Kennard:

Section 253(a) of the Federal Telecommunications Act of 1996 says, "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." [emphasis added.] The Missouri Municipal League ("MML") wants this Commission to rule that a Missouri statute restricting a political subdivision's authority to provide the kind of telecommunications service that would require a certificate of authority is preempted. MML argues that phrase "any entity" includes a state's political subdivisions. This issue could not have been more clearly decided in *City of Abilene v. Federal Communications Commission*, 164 F.3d 49 (D.C. Cir. 1999).

In *City of Abilene*, the D.C. Circuit denied the City of Abilene's petition for judicial review of this Commission's decision. Just as the MML does in this case, Abilene asked this Commission to rule that § 253(a) preempts a Texas statute, Texas Public Utility Regulatory Act of 1995 § 3.251(d), that "renders municipalities ineligible for the certificates [to provide local exchange telephone service, basic local telecommunications service, or switched access service] and forbids them from selling, 'directly or indirectly,' telecommunications services to the public." *City of Abilene* at 51.

The D.C. Circuit understood the issue faced by this Commission in *City of Abilene*, and now in this case. Judge Randolph's opening paragraph is crystal clear:

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> The State of Texas has a law prohibiting its municipalities from providing telecommunications services. The United States has a law against state statutes that bar "any entity" from this line of business. If a Texas municipality is "any entity," the Supremacy Clause, U.S. Const. art. VI, cl. 2, would render the Texas law a nullity, or so it is claimed. In legal parlance, the federal law would "preempt" the state law. The question here is whether the Federal Communications Commission, which administers the federal law, rightly decided that the Texas law is not preempted.

That is the exact issue the Commission faces now, substituting "Missouri" for "Texas" and "political subdivision" for "municipality." And, the *City of Abilene* court found that there was no reason to believe Congress intended to include municipalities or political subdivisions within the category of "any entity." *City of Abilene* at 54.

The D.C. Circuit scrutinized the language contained in § 253(a) and its legislative history using the standard articulated by the United State's Supreme Court in *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395 (1991). "To claim, as the city of Abilene does, that § 253(a) bars Texas from limiting entry of its municipalities into the telecommunications business is to claim that Congress altered the State's governmental structure." *City of Abilene* at 52. In, *Gregory* the Supreme Court refused to infer this sort of congressional intrusion: "States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." 501 U.S. at 461, 111 S.Ct. 2395. *Id.* The D.C. Circuit went on to emphasize that states, not Congress, dictate the powers of state subdivisions: "Like the Commission, we therefore must be certain that Congress intended § 253(a) to govern State-local relationships regarding the provisions of telecommunications services. This level of confidence may arise, *Gregory* instructs us, only when Congress has manifested its intention with unmistakable clarity. See 501 U.S. at 460, 111 S.Ct. 2395." 164 F.3d at 52. The court demanded much more than Section 253(a) gives, "Federal law, in short, may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels the intrusion. Section 253(a) fails this test." Id. [emphasis added].

The D.C. Circuit then went on to explain that "any entity" does not mean municipality because otherwise, municipalities would have protection from state laws restricting their governmental activities. The court explained that there is no meaningful textual evidence to suggest that Congress, in using the term "entity" in § 253(a) "meant to authorize municipalities, otherwise barred by State law, to enter the telecommunications business." *City of Abilene* at 53. The court notes that when the text of a federal statute fails to indicate whether Congress focused on the effect on

state sovereignty, *Gregory's* holding is to not construe the statue to reach so far. *Id.* The court concludes, "Congress did not express any clear intent in § 253(a) to transfer to the Commission the states' traditional power to regulate their subdivisions." 164 F.3d at 53.

The Missouri law that MML seeks to have the Commission preempt is very similar to the Texas statute in *City of Abilene*. MO. REV. STAT. § 392.410(7) (Supp. 1997) states:

> No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:
>
> (1) For its own use;
> (2) For 911, E-911 or other emergency services;
> (3) For medical or educational purposes;
> (4) To students by an educational institution; or
> (5) Internet type services.

Instead of using the word "municipality," Missouri uses the term "political subdivision." But "political subdivision" underscores a concept articulated in *City of Abilene:* that "[w]hatever the scope of congressional authority in this regard, interfering with the relationship between a state and its political subdivisions strikes near the heart of State sovereignty. Local governmental units within a State have long been treated as mere 'convenient agencies' for exercising State powers. See *Sailors v. Board of Educ.*, 387 U.S. 105, 107-108, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967)." *City of Abilene* at 52.

In passing MO. REV. STAT. § 392.410(7) (Supp. 1997), Missouri exercised its power as a sovereign state. Missouri is not even a "home rule" state. Its political subdivisions have only the powers conveyed upon them by the State government. Missouri's exercise of sovereignty is protected by Supreme Court precedent like

Gregory and *Sailors* cited above. And, *City of Abilene* affirms this Commission's determination that § 253(a) does not preempt a state's exercise of its sovereignty over its own political subdivisions.

It does not matter for the purposes of this Commission's analysis whether a city owned electric utility is a political subdivision of the State of Missouri or not. If it is, it must abide by MO. REV. STAT. § 392.410(7) (Supp. 1997). It is not, then MO. REV. STAT. § 392.410(7) (Supp. 1997) does not apply. Either way, whether a city owned electric utility is a political subdivision of the State of Missouri is a matter of Missouri law. Though this Commission has many duties and responsibilities under its enabling legislation, adjudicating issues whose answers lie solely in the interpretation of Missouri law is not among them.

Missouri, like Congress and this Commission, wants to see its telecommunication markets thrive with robust competition. Missouri, as is evident by MO. REV. STAT. § 392.410(7) (Supp. 1997), believes that restricting its political subdivisions from usurping private sector opportunities maximizes its chance to have thriving competitive telecommunications markets. Whether, as a practical matter, that strategy will bear fruit, only time will tell. But as a matter of law, as the D.C. Circuit ruled in *City of Abilene*, the mechanism Missouri has chosen is not preempted by § 253(a). Missouri has simply exercised its constitutionally protected sovereignty over its own political subdivisions. This Commission respected Texas' decision to do just that. The D.C. Circuit affirmed this Commission's good judgment and established binding law in *City of Abilene*.

On behalf of the State of Missouri, we respectfully request that the Commission abide by the D.C. Circuit's decision in *City of Abilene*, and deny MML's petition for preemption.

Respectfully,

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